

United States Bankruptcy Court
Eastern District of Michigan
Southern Division

In re:

Richard Keith Carlson, Jr.,
Debtor.

Case No. 05-69540-R
Chapter 7

Gene R. Kohut,

Plaintiff,

v.

Adv. No. 05-5779

Richard Keith Carlson, Jr.,
Defendant.

Opinion Regarding Motion to Dismiss Complaint

This matter is before the Court on the debtor's motion to dismiss Gene R. Kohut's complaint and Kohut's request for summary judgment. The debtor contends that Kohut's complaint does not state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) and fails to plead fraud with proper specificity as required under Federal Rule of Civil Procedure 9(b). The Court concludes that complaint adequately states a claim upon which relief may be granted and that it is clear that Kohut is requesting that the debt be held nondischargeable on the grounds of a prior conversion judgment. Therefore, the Court denies the debtor's motion to dismiss the complaint. Further, Kohut's request for summary judgment is not properly before the Court and therefore must be denied.

I.

The debtor and Kelly R. Carlson ("Carlson") were previously married. While married, they

entered into a building contract to purchase a house and a lot. The debtor and Carlson were divorced pursuant to consent agreement on August 23, 2002. According to the Judgment of Divorce, Carlson was to be paid \$28,000 within thirty days of the Judgment. If the \$28,000 was not paid within thirty days, the Judgment stated that a receiver would be appointed to sell the residence, with "[t]he proceeds, if any, after the cost of the sale [to be] divided equally between [Carlson] and [the debtor]." The \$28,000 was not paid; instead, the debtor sold the house at a profit.

On November 25, 2003, Carlson filed a Chapter 7 proceeding, Case No. 03-72715-MBM, and assigned to Hon. Marci B. McIvor. Kohut was appointed Chapter 7 Trustee in that case. Kohut filed an adversary proceeding against the debtor and a judgment was entered against the debtor for common law conversion. The ruling was that the debtor had converted assets from the marital estate to his own use in violation of the divorce decree.

On September 12, 2005, the debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On October 17, 2005, Kohut filed a complaint for a determination that the debt is nondischargeable under § 523(a)(2) or, alternatively, under § 523(a)(4). On November 28, 2005, the debtor filed a motion to dismiss the complaint.

II.

The debtor contends that the complaint should be dismissed under Rule 12(b)(6) because it does not properly set forth factual allegations that would support an action for nondischargeability. The debtor also contends that the complaint should be dismissed because it does not plead fraud with the proper specificity under Rule 9(b). Kohut states that based upon the previous findings by Judge McIvor, the Court

should not only find the pleading sufficient, but also that this Court should find sufficient basis to grant summary judgment.

III.

Rule 12(b)(6), made applicable to adversary proceedings by Fed. R. Bankr. P. 7012(b), indicates, in relevant part:

The following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted[.]

Fed. R. Civ. P. 12(b)(6).

Under Rule 12(b)(6) a defendant is allowed to test whether, as a matter of law, the plaintiff is entitled to legal relief assuming everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993); *First Union Nat'l Bank v. MCA Fin. Corp. (In re MCA Fin. Corp.)*, 237 B.R. 338, 340 (Bankr. E.D. Mich. 1999). A complaint should only be dismissed for failure to state a claim when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Mylod*, 988 F.2d 638; *First Union Nat'l Bank*, 237 B.R. 340.

The complaint alleges that plaintiff was the duly appointed, qualified, and acting Chapter 7 Trustee in Carlson's case, Case No. 03-72715-mbm. In that case, a judgment had been entered against the debtor for common law conversion, ruling that debtor had converted assets from the marital estate to his own use in violation of the divorce decree. The complaint states that the debt arising from the judgment from the prior case in the amount of \$36,935.17 should be declared nondischargeable pursuant to § 523(a)(2) because the money had been obtained by false pretenses, false representations, or actual fraud. The

complaint asserts that alternatively, the debt is nondischargeable under § 523(a)(4) because the debtor obtained the money by fraud or defalcation while debtor was acting in the fiduciary capacity of liquidating the marital property or embezzled funds which should have belonged to Carlson, or obtained the money through larceny by trick.

The court concludes that the complaint quite adequately states a claim upon which relief can be granted and thus will not be dismissed pursuant to Rule 12(b)(6).

IV.

Under Rule 9(b), a complaint alleging fraud must allege the surrounding circumstances with particularity. *Walburn v. Lockheed Martin Corp.*, ___ F.3d ___, 2005 U.S. App. LEXIS 28074, 12-13 (6th Cir. 2005); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 641-43 (6th Cir. 2003). To comply with Rule 9(b), a plaintiff, at a minimum, must “allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.” *Bledsoe*, 342 F.3d 643 (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993)).

Here, the complaint sufficiently identifies the fraudulent acts of the debtor in his conversion of marital property to his own use and the injury resulting therefrom. The complaint also refers to judicial opinion in which Judge McIvor made the specific findings regarding the debtor’s actions, including the time and place of the wrongful acts. It is clear that Kohut is seeking nondischargeability on the grounds of the prior conversion judgment. The allegations of the complaint are legally sufficient under Rule 9(b) because they provide “the time, place, and content” of the allegedly fraudulent acts by debtor. *Walburn*, at 12-13.

V.

In his response to the debtor's motion to dismiss, Kohut requested that summary judgment be granted in this case. However, Kohut did not file a motion for summary disposition. Therefore, Kohut's motion for summary judgment must be denied.

Accordingly, it is ordered that the debtor's motion to dismiss the complaint and Kohut's request for summary judgment are denied.

Not for Publication

Entered: January 24, 2006

/s/ Steven Rhodes
Steven Rhodes
Chief Bankruptcy Judge